RECORD
AND
BRIEFS

No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, *et al.*,

Petitioners,

—v.—

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF OF VOLKER BECK AND CHRISTOPH STRÄSSER, MEMBERS OF PARLIAMENT OF THE FEDERAL REPUBLIC OF GERMANY, *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amici curiae are the human rights policy spokespersons of their respective parliamentary groups in the German Bundestag. Volker Beck represents the Alliance 90/The Greens parliamentary group, and Christoph Strässer represents the SPD parliamentary group. In the period from 1999 to 2005, these two parliamentary groups formed the governing coalition; at present, they are part of the opposition.[1]

We do not share the Federal Government's opinion, expressed in its *amicus curiae* brief of February 2, 2012, that it is wrong for U.S. courts to hear human rights cases with little connection to the United States. *See* Brief of Federal Republic of Germany as Amicus Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 2, 2012). The fact that the Federal Government's brief does not identify any

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[1] No counsel for a party authored this brief in whole or in part, nor did any such counsel or any party make a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae* made any monetary contribution to the preparation or submission of the brief. Counsel of record for respondents gave blanket consent for the submission of *amicus* briefs on March 22, 2012. Counsel of record for petitioners gave blanket consent for the submission of *amicus* briefs on March 27, 2012.

concrete potential effects on German international relations or German sovereignty and fails to take into account the importance of human rights protection in the preservation of the international order strongly suggests that these claims are mere pretexts for a parochial interest in protecting German businesses from human rights liability.

For members of the German Bundestag, the highest legislative body of the Federal Republic of Germany, the accountability of all persons— including business entities— for human rights violations is a high priority. The Alien Tort Statute, 28 U.S.C. § 1350 (ATS), is exemplary in this regard. We therefore have an interest in demonstrating to the Court that the government's brief does not accurately represent the foreign or economic policy interests of the Federal Republic of Germany or its people.

SUMMARY OF ARGUMENT

Given Germany's history, it is particularly troubling that the Federal Government has chosen to intervene in support of cutting off an important avenue of accountability for human rights abuses involving corporate activity. In particular, the prospect of Alien Tort Statute (ATS) litigation was crucial in creating the conditions for a comprehensive framework for compensating victims of forced labor during the Nazi era.

Despite the government's claim that civil remedies exist in German law, the victims' decades-long struggle for justice illustrates that even where remedies for corporate abuses formally exist, the barriers to accessing those remedies are often prohibitive. Germany's support of the U.N. Guiding Principles, which recognize the need for effective remedies, contradicts its opposition to the application of the ATS, which may in some cases be the only truly effective remedy available for victims of human rights violations arising abroad.

The Federal Government's argument that extraterritorial application of the ATS may violate Germany's sovereignty is groundless. The government identifies no concrete potential infringements; multinational companies are commonly subject to concurrent jurisdiction for lawsuits in transnational matters. Moreover, the principle of universal jurisdiction allows any state to adjudicate human rights violations that amount to international crimes; this principle extends to

civil liability as well.

Finally, contrary to the argument of German business federations, the ATS does not affect international trade. The risk of frivolous ATS suits is low, as the barriers to building a legal case for foreign victims of corporate abuses are high and, in any case, corporations are only rarely involved in the kinds of conduct that can give rise to a claim under the ATS. Moreover, the potential liability in ATS cases is negligible compared to the size and profitability of the companies that typically face ATS claims.

ARGUMENT

1. The Alien Tort Statute is one of the most important avenues of redress for victims of corporate human rights abuses and has been pivotal in obtaining justice for victims of the worst atrocities in German history

German enterprises committed some of the most serious and atrocious violations of human rights of the twentieth century, including the use of forced labor during the National Socialist regime. While the criminal liability of economic actors for supporting and profiting from this regime of terror was recognized in the follow-up trials to Nuremberg, the victims of the companies' crimes were not compensated at that time. These companies refused to accept responsibility for the exploitation of thousands of workers, and victims

received no redress in the half-century that followed.

A solution to this problem finally emerged in the late 1990s, but only after victims prepared to initiate civil litigation against the corporate perpetrators under the ATS. The prospect of ATS litigation induced German enterprises and the German government to cooperate with victims' associations to reach an extrajudicial agreement regarding compensation. A foundation was formed, and individuals were eligible to receive individual payments as redress for the abuses they suffered. *See* Michael Bazyler, *Nuremberg in America: Litigating the Holocaust in the U.S. Courts*, 34 U. Rich. L. Rev. 1, 194-97 (2000); *see also* Decl. of Stuart E. Eizenstat, Deputy Sec'y of the Treasury & Special Representative of the President and Sec'y of State on Holocaust Issues, 2-7, *In re Nazi Era Cases Against German Defs. Litig.*, MDL No. 1337 (D.N.J. Oct. 20, 2000), *available at* http://www.state.gov/documents/organization/6532.doc. Absent the ATS, none of this would have been possible.

The German governments of the past 40 years have emphasized the need to deal with the horrors of our Nazi past. Given the instrumental role German companies played in the Nazi regime, it is unfortunate and inconsistent for the German government to come to the defense of companies in ATS cases in which plaintiffs seek to hold corporations accountable for their human rights abuses. Differences between the Nazis and the

modern regimes whose human rights abuses are fueled by corporations cannot explain the German government's intervention on behalf of companies in recent ATS cases; human rights violations in apartheid South Africa or Nigeria under a military dictatorship are equally deserving of redress.

The belated compensation of victims of Nazi forced labor illustrates the difficulties faced by individuals who seek remedies for serious human rights violations. When victims cannot bring claims in the states where the violations took place or the states where potential defendants are headquartered, the ATS may be the only effective form of redress available.

The accessibility of effective remedies for victims of corporate human rights violations is one of the core issues in the field of Business and Human Rights. Its importance is reflected in the 2011 decision by the UN Human Rights Council (UNHRC) to unanimously endorse the UN Guiding Principles on Business and Human Rights, which operationalize the "Protect, Respect, Remedy" framework and give priority to the need for effective remedies. The Guiding Principles aim to provide a global standard for preventing and addressing corporate human rights violations. U.N. Hum. Rts. Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Enterprises, U.N. Doc. A/HRC/RES/17/4 (June 16, 2011). In addition to the "State Duty to Protect" and the "Corporate Responsibility to Respect," the Guiding Principles focus on the

"Access to Remedy," seeking to ensure that wherever people are harmed by business activity, there is adequate accountability and effective redress. Included in the Guiding Principles is a call to states to provide effective judicial remedies for violations of human rights perpetrated by corporations.[2]

The UNHRC acknowledges that effective remedies are all too often unavailable for victims and expresses concern that weak national legislation and implementation will be outweighed by the negative impact of globalization and business-related human rights risks. *Id.* pmbl. & ¶ 4(e).

Given the rarity of remedies for corporate human rights abuses and the obstacles to accessing the few existing remedies, it seems absurd that one of the primary avenues for

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[2] *See* Special Representative of the Secretary-General on the Issue of Hum. Rts. and Transnat'l. Corps. and Other Bus. Enters., Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework, Commentary on Principle 25, U.N. Doc. A/HRC/17/4 (Mar. 21, 2011). ("Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they occur, the State duty to protect can be rendered weak or even meaningless."); *id.* Commentary on Principles 26 ("Effective judicial mechanisms are at the core of ensuring access to remedy. . . . States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts . . . .")

redress, the ATS, should be blocked a year after the endorsement of the UN Guiding Principles on Business and Human Rights. It is even more contradictory that the German government, one of the main supporters of the development of the Guiding Principles, now actively seeks the abolition of one of the most effective remedies in the business and human rights field to date.

It is our objective to amend German tort law and the law of civil procedure, in order to remove any barriers that prevent victims of human-rights violations caused by German enterprises from obtaining an effective remedy in Germany. For the present, however, the Federal Government is mistaken when it states that foreign victims of any human-rights violations caused by German enterprises abroad may take action for compensation before German courts under § 823 of the German Civil Code, Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18. 1896, Reichsgesetzblatt [RGBl] 195, as amended, in conjunction with §§ 13, 17 and 32 of the German Code of Civil Procedure, Zivilprozeßordnung [ZPO] [Code of Civil Procedure], Jan. 30, 1877, Reichsgesetzblatt [RGBl] 83, as amended. *See* Brief of Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 11-12, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 2, 2012) (hereinafter "Gov't Br."). In fact, the applicable procedural provisions would not be the above-cited sections of the Code of Civil Procedure, but the Brussels I Regulation, which governs jurisdiction in civil and commercial matters on the

European level. Council Regulation 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 2, 2001 O.J. (L 12) 1, 3. In addition, due to Germany's obligations under European Union law, civil liability would not be governed by section 823 of the Civil Code, but rather by the Rome II Regulation, which in many (but not all) cases points to the *lex loci delicti commissi*, i.e. the law of state in which the alleged violation of human rights was committed. Commission Regulation 864/2007, on the law applicable to non-contractual obligations (Rome II). art. 4, 2007 O.J. (L 199) 40, 44. The Federal Government does not mention these facts in its brief; instead, it creates the deceptive impression that there are no undue barriers to remedying international human rights violations in Germany.

The Federal Government suggests that claims against a German corporation for human rights abuses committed in a third country would be more appropriately heard in a German forum, while deceptively omitting important details regarding the openness of German courts to such claims. Such a position is inconsistent with Germany's advocacy for effective human rights remedial mechanisms, both at home and abroad.

2. ATS litigation does not constitute a violation of the sovereignty of the Federal Republic of Germany

In its brief as *amicus curiae*, the Federal Government states that it "believes that over-broad exercises of jurisdiction are contrary to international law and create a substantial risk of jurisdictional conflicts with other countries." Gov't Br. at 1. It explains neither where these risks lie nor what alternatives might be possible or desirable.

If the alternative spells the end of an important opportunity for victims of human rights violations to gain redress, we decidedly reject the opinion of the Federal Government. The Federal Government also states that it is concerned that the failure by some United States court to take into account limitations on the exercise of their jurisdiction when construing the Alien Tort Statute, has resulted in the assertion of subject matter jurisdiction over suits by foreign plaintiffs against foreign corporate defendants for conduct that took place entirely on the territory of a foreign sovereign and lack sufficient nexus to the United States. Such assertions of jurisdictions are likely to interfere with foreign sovereign interests in governing their own territories and subjects and in applying their own laws in cases which have a closer nexus to those countries. *Id.*

The Federal Government neither lists the ATS cases in which it has identified a violation of state sovereignty as a result of U.S. courts' exercise of jurisdiction, nor does it state the specific principles of international law or comity that the ATS contradicts.

The brief seems to suggest that suits against legal persons subject to German law infringe on Germany's legislative powers. This objection is not convincing. Companies headquartered in Germany frequently face commercial lawsuits abroad. Private international law provides for concurrent jurisdictions in civil matters, and plaintiffs can choose between different national jurisdictions when available.

Germany cannot demand German forums for companies headquartered in Germany, as there is no basis for this requirement in international law.

The German government also fails to sufficiently acknowledge that suits under the ATS generally concern human rights violations amounting to international crimes. It is widely accepted that the commission of such crimes rise to the level of international concern, such that claims of state sovereignty are no barrier to extraterritorial jurisdiction. The principle of universal jurisdiction expresses the international consensus that atrocities such as genocide, crimes against humanity, and war crimes affect the international community as a whole. For this reason, a state that prosecutes these crimes, even if lacking a connection to the victim, the offender, or the commission of the crime, does not infringe upon any state's sovereignty. The principle of universal jurisdiction is established firmly in the German Code of Crimes against International Law. Völkerstrafgesetzbuch [VStGB] [German Code of Crimes against International Law], June

26, 2002, BGBl. I at 2254, § 1 (F.R.G.).

We would argue that the exercise of civil jurisdiction is a matter of less severity than criminal jurisdiction. If the principle of universal jurisdiction permits criminal prosecution for human rights crimes, the jurisdiction to remedy such atrocities through civil actions must be even broader. The broad understanding of universal jurisdiction embodied in the German Code of Crimes against International Law, including its explicit authorization of extraterritorial application of German law, only underscores the inconsistency presented by the Federal Government's rejection of the ATS when applied beyond the borders of the U.S.

3. ATS litigation does not endanger international trade

Although the German government's brief does not discuss the impacts of the ATS on international trade, the German Chambers of Commerce and Industry and the Federation of German Industries[3] argue that ATS litigation

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[3] The Federation of German Industries lobbied the German government to submit its original brief in this case. *See* Response of the Federal Government to the Request of Representatives Volker Beck (Cologne), Marieluise Beck (Bremen), Agnes Brugger, and the Alliance 90/Greens, "The behavior of the Federal Government in the Kiobel versus Shell dispute" BT-Drucksache 17/9687, at 4 (June 1, 2012)

against corporations for human rights abuses abroad constitutes a serious threat to international investment and trade. *See* Brief of the Association of German Chambers of Industry and Commerce *et al.* as *Amici Curiae* in Support of Respondents at 16-24, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 2, 2012).

These business groups considerably overestimate the impact that civil damages suits under the ATS could have on German corporations. As the small number of lawsuits filed against non-US companies demonstrates, corporations are rarely involved in severe human rights abuses. Only in extreme cases do companies actually run the risk of being sued under the ATS.

In addition, one cannot ignore the significant practical and legal difficulties faced by victims of even the most severe violations of human rights. The resources of victims pale in comparison to those of multinational corporations. Suits involving circumstances as complex as human rights violations under the military regime in Nigeria in the early 1990s require significant resources to meet the extremely high costs of legal proceedings. Due to the high costs of simply initiating a legal action as well as the other barriers to the effective remediation of human

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(explaining that the Federation of German Industries approached the government about the importance of filing a brief in the Supreme Court) (original in German).

rights violations, the concern of frivolous lawsuits is negligible.

Furthermore, it is absurd to believe that the financial costs of ATS litigation pose serious threats to the survival of multinational corporations. The yearly revenues of these firms are often larger than the gross national product of many states in which human rights abuses take place. There have been few settlements and judgments in ATS litigation against companies. The most recent example is the 2009 settlement of the *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (S.D.N.Y.), in which the defendants agreed to pay a total of $15 million, a sum that falls far short of even a single day's revenue for Shell.

As representatives of the German people, we have a special interest in supporting the right of victims of human rights violations to resort to any jurisdiction that provides an effective remedy. Businesses do not require the freedom to commit human rights violations in order to succeed, nor is it in the interests of German foreign policy, which prioritizes human rights accountability, to grant them impunity for such practices.

CONCLUSION

For the foregoing reasons, the court should reverse the judgment of the Court of Appeals and

find no extraterritorial limitations on the applicability of the ATS.

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Respectfully submitted,

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